EXHIBIT A

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 05-81-00465-CR
No. 05-81-00466-CR

NATHAN MAURICE SHAY,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

May 4, 1982

From a District Court of Dallas County, Texas.

Before CHIEF JUSTICE GUITTARD and JUSTICES FISH and VANCE, Opinion Per Curiam.

Offense: Passing forged instrument (two offenses arising from the sale of two airline coupons). Trial: By a jury. Sentence: Four years. All of Appellant's grounds of error are overruled for the reasons stated.

First Ground: Failure to Prove all Elements of the Offense.

In his first ground of error, appellant contends the State failed to prove the necessary elements of the offense. He argues that the evidence is insufficient to show

that he had knowledge the coupons which he sold were forged or that he intended to defraud the complaining witness, George Kent.

Considering the evidence in the light most favorable to the State, we are unable to agree with appellant's contention. The State may establish intent to defraud or harm circumstantially by proof of the accused's knowledge that the instrument was forged. Hill v. State, 608 S.W.2d 932,934 (Tex. Crim. App. 1980); Wilson v. State, 605 S.W.2d 284,286 (Tex. Crim. App. 1980). George Kent testified that at the time of the transaction, appellant insisted on cash, refused to give Kent his telephone number, which was unlisted, and gave Kent a false name. We find these circumstances sufficient, taken as a whole, for the jury to find that appellant knew that the coupons in question were forged and, therefore, acted with intent to defraud. See Castanuela v. State, 435 S.W.2d 146, 147-148 (Tex. Crim. App. 1968).

Second Ground: Identification of Coupons

Appellant next contends the trial court erred in admitting the coupons in evidence since the complaining witness failed to positively identify the two coupons as those sold to him. Although the complaining witnexx was unable to positively identify the coupons admitted at trial, a positive identification was made by subsequent witnesses who testified on behalf of the State. James Craft, an employee of American Airlines, testified that after Kent tendered the coupons to a ticket agent, the coupons were placed in a sealed envelope and taken to Jesse Orr, a security representative for the airline. Orr testified that before receiving the coupons in question, Craft read to him over the telephone the serial numbers of the coupons received from Kent. Orr stated that he made a written memorandum of the numbers read to him and that upon receiving the coupons from Craft he matched the serial numbers on the coupons with the

numbers contained in his written memorandum. Orr testified that he then turned the coupons over to the police. At trial Orr identified the coupons admitted in evidence as the coupons handed to him by Craft. We hold the testimony of these two witnesses sufficient to identify the coupons admitted at trial.

Third Ground: Additional Witnesses

In his third ground of error, appellant contends the trial court erred in overruling his motion for mistrial. Appellant argues that his motion should have been granted because the state was permitted to call three additional witnesses whose names did not appear on the list of witnesses provided by the State prior to trial.

The record shows that in response to a motion filed by appellant, the State furnished appellant a list of witnesses who would be called to testify at trial. The names of Faye Jackson, James Craft, and Jesse Orr were not included on the list. At trial the prosecutor requested that these

three witnesses be permitted to testify to prove the identity of the forged coupons. The prosecutor stated that he had not intended to call these witnesses to testify, but that their testimony was required because the other witnesses had failed to identify the coupons. Appellant pleaded surprise and asked for a mistrial, but did not move for a continuance or for a postponement under Article 29.13 of the Code of Criminal Procedure so that he could interview the additional witnesses. Neither did he show bad faith on the part of the State in failing to disclose their names. In light of these facts, we conclude that the trial court did not abuse its discretion in denying the mistrial. Lincoln v. State, 508 S.W.2d 635, 637 (Tex. Crim. App. 1974).

Fourth Ground: Motion for New Trial

Appellant contends the trial court erred in sentencing appellant without considering his motion for new trial or his amended motion for new trial, which, he asserts, had

not been overruled by the court or by operation of law. The following facts are established in the record.

Judgment was entered on October 2, 1980; the trial court sentenced appellant on the same date. In so doing, the trial court, under the law then in effect, denied appellant the ten-day statutory period for filing a motion for new trial. TEX. CODE CRIM. PRO. ANN. Art. 40.05 (Vernon 1979). Nevertheless, appellant filed a motion for new trial on October 6, 1980. Subsequently, the court realized that this procedure was improper because the sentence had been pronounced before the motion was filed. Accordingly, on May 19, 1981, appellant filed a motion to withdraw his appeal, which the trial court granted. On the same date the court entered an order setting aside the sentence entered on October 2, 1980. The court re-sentenced appellant on June 1, 1981.

Because appellant was convicted and sentenced on the same day without having

waived the statutory ten-day period in which to file a motion for new trial, the sentence was improper and the notice of appeal was premature. Woods v. State, 532 S.W.2d 608 (Tex. Crim. App. 1976). This being so, appellant's motion for new trial was timely filed and properly before the court. See Reed v. State, 516 S.W.2d 680 (Tex. Crim. App. 1974). If not ruled on by the court, it was overruled by operation of law on October 26, twenty days after it was filed. TEX. CODE CRIM. PRO. ANN. Art. 40.05 (Vernon 1979); St. Jules v. State, 438 S.W.2d 568, 570 (Tex. Crim. App. 1969). Thus appellant was not denied his right to file a motion for new trial. The trial court, however, realizing that the first sentence was improper, set it aside and waited twelve days before pronouncing sentence again. Thus defendant had another opportunity to present or file a motion for new trial. Woods v. State, supra. This he did not do. The second sentence, therefore, was proper and the

appeal was duly perfected. Under these circumstances we conclude that appellant was not prejudiced by any error in the first sentence.

Affirmed.

PER CURIAM

D.N.P.
Rule 207

EXHIBIT B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas SEP 15 1982

I have been instructed to advise that the Court has this day refused the APPELLANT'S petition for discretionary review in Cause No. 609-82, NATHAN MAURICE SHAY, 610-82, NATHAN MAURICE SHAY.

Sincerely yours,

THOMAS LOWE, Clerk

EXHIBIT C

Court of Appeals
Fifth Supreme Judicial District of Texas
Dallas County Courthouse
Dallas, Texas 75202

Date: June 17, 1982

Honorable Kerry P. FitzGerald
Attorney at Law,
3503 Fairmount
Dallas, TX 75219

Counsel:

You are nereby notified that, in the case of:

NATHAN MAURICE SHAY, Appellant vs. The State of Texas, Appellee, our NO. 05-81-00465-CR the following decision and order was this date made and entered by the Court:

Motion for Rehearing, OVERRULED: June 17, 1982.

Respectfully yours,

JEANNETTE JOHNSON, CLERK
COURT OF APPEALS, FIFTH
SUPREME JUDICIAL DISTRICT
OF TEXAS, DALLAS, TEXAS

By Myra Sands, Deputy

cc: (2 copies) CLERK, COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS, 78711.

cc: W. T. Westmoreland, Jr.
Assistant District Attorney
Dallas County, Texas